



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYERI**

**Civil Case 79 of 2005**

**UMOJA SERVICE STATION LIMITED & 5 OTHERS ..... PLAINTIFF  
VERSUS  
HEZY JOHN LIMITED & 4 OTHERS ..... DEFENDANT**

**R U L I N G**

By a Chamber Summons dated 19<sup>th</sup> September 2005, the Plaintiff applicants seek orders under order XXXIX rule 1 & 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for the Defendants, their servants or agents or any person claiming through them to be restrained by an order of temporary injunction from taking over the 1<sup>st</sup> Plaintiff Company as directors, or, interfering with the operation of the 1<sup>st</sup> Plaintiff Company on the strength of meetings held on 2<sup>nd</sup> July 2005 and 3<sup>rd</sup> September 2005. The applicants further seeks orders to have the meetings of 2<sup>nd</sup> July 2005 and 3<sup>rd</sup> September 2005 declared to be null and void ab initio.

It is the applicants contention that the notices issued for the meeting were irregular and defective as the notice of 7<sup>th</sup> April 2005 was not requisitioned by persons holding one tenth of the total number of shares, whilst the notice dated 10<sup>th</sup> June 2005 does not represent ½ the total number of shares. It is therefore submitted that the notices do not comply with the provisions of the Company's Act. It was further contended that the notices were not served on the Directors.

The applicants further contend that the notice of 10<sup>th</sup> August 2005 was defective as it was adjourning a meeting without the consent or approval of members.

The applicants relied on various authorities as follows: The case of **William Ole Ntimama v/s Musilara Ltd. (C.A. Civil Appeal No. 228 (Nai) of 2003)** where the Court of appeal held that where notice of a meeting was not given to Directors and business discussed not of a general but of a special nature, the Companies Act had been contravened and the Directors were reinstated.

- The case of **Mwanyi Dealers Ltd. & others v/s Sezibwa United Farmers Ltd. & others (1970) EA 299** – where it was held that a special meeting held without special notices being given to members in due time was null and void. It was submitted that notice of a proper special purpose

of the meeting had to be given to the members.

- The case of **Macdougall v/s Gardiner (1874) Ch Division Vol. 1 page 13** in which it was held that members must consent to the adjournment of a meeting. It was contended that no consent was given by the members in this case.
- Finally the case of **Musa Misango v/s Eria Musingire & others (1966) EA 390** was quoted in support of the applicant's contention that any member of the company could bring proceedings where the acts complained of injure him or are either fraudulent or Ultra Vires.

The applicants therefore urge the court to find that the notices upon which the meetings of 2<sup>nd</sup> July 2005 and 3<sup>rd</sup> September 2005 were held were defective and therefore the meetings ought to be declared null and void.

The Respondents have filed grounds of opposition dated 27<sup>th</sup> September 2005 as well as replying affidavits. It was submitted for the Respondents that prayer (3) which was for a declaration that the meetings of 2<sup>nd</sup> July 2005 and 3<sup>rd</sup> September 2005 are null and void, cannot be canvassed in an application for injunction.

It was further submitted that the prayer for a temporary injunction restraining the Respondents from taking over the 1<sup>st</sup> Plaintiff Co. as Directors had already been overtaken by events as the Respondents had already forwarded their returns to the Registrar of Companies and had already been registered as Directors.

The Respondents maintained that the notices for the meetings in which the applicants were voted out were properly issued by members of the Company holding 6,858 shares which is more than 10% of the Company's shares and therefore in accordance with section 132 of the Companies Act and Article 16 of the Company's Article.

It was also submitted that all the applicants participated in the meetings in question and were therefore party to the whole process.

Mr. Kebuka who appeared for the Respondent sought to distinguished all the authorities relied upon by the applicants and urged the court to find that the Respondents are acting in the best interest of the company and therefore dismiss the application.

Having considered this application I find that the prayers sought in the interlocutory application are identical to the prayers prayed for in the plaint. This means that should this court determine the issues at this stage it will essentially pre-empt the issues likely to be canvassed at the hearing of the main suit.

Moreover prayer (3) which is for a declaration is a final prayer. I concur with the Respondents that such a declaration cannot be determined at this interlocutory stage.

As regards the prayer for a temporary injunction restraining the Defendants from taking over the 1<sup>st</sup> Plaintiff Company as Directors, it is evident that the action sought to be prevented has already taken place as the Defendants have already been registered as Directors of the 1<sup>st</sup> Plaintiff company as is evident from Annexure "DKM-2" to the affidavit of Douglas Kingori Muthua showing that the Respondents are the current Directors of the 1<sup>st</sup> Plaintiff Company. It would not therefore be appropriate to grant the order

sought of interlocutory injunction.

Further the principles upon which an interlocutory injunction can be granted as laid down in the case of **Giella v/s Cassman Brown & Co. Ltd.** are clear that there must not only be a prima facie case with a probability of success but that the applicants must also show that they stand to suffer substantial loss which cannot be adequately compensated by an award for damages. In this case although the applicants have attempted to establish a prima facie case that they have been irregularly removed as directors of the 1<sup>st</sup> Plaintiff Company, the applicants have not satisfied this court that they stand to suffer substantial loss or that such loss if any, cannot be adequately compensated by an award for damages.

In all the circumstances of this case, it is my considered view that this application cannot succeed.

I do therefore dismiss the application dated 19/9/2005 and order that the issues raised therein be canvassed and dealt with at the full trial. Those shall be the orders of this court.

***Dated signed and delivered this 23<sup>rd</sup> day of January 2006.***

**H. M. OKWENGU**

**JUDGE**